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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 48

DONALD HEIDER, *Petitioner*

v.

MICHIGAN SUGAR CO., *Respondent*

On Writ of Certiorari to
The Supreme Court of Michigan

NO. 388

JEANNE KING, *Petitioner*

v.

VICO INSURANCE CO. OF ST. LOUIS, *Respondent*

On Petition for Rehearing of Denial
Of Certiorari to the Louisiana Supreme Court

NO. 502

RUSSELL H. SITTON, ET UX., *Petitioners*

v.

AMERICAN TITLE CO. OF DALLAS, ET AL., *Respondents*

On Petition for a Writ of Certiorari to
The Court of Civil Appeals for the Fifth
Supreme Judicial District of Texas

MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES AND BRIEF IN SUPPORT THEREOF

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MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES

Your Movants, Russell H. Sitton and wife, Barbara J. Sitton, being also the Petitioners in Case No. 502, aforesaid, do hereby move that the above styled cases, Nos. 48, 388 and 502, be jointly considered or formally consoli-

dated as the Court may deem most expeditious. In support thereof, Petitioners would show that the same involve common questions of fact and law arising under the Seventh and Fourteenth Amendments as more fully shown by the annexed brief.

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BRIEF IN SUPPORT OF MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES

Your movants are the petitioners in Case No. 502. They submit that all three cases captioned above involve a common fact situation: that is, a jury verdict was returned for the plaintiff and later overturned by the court, either trial

or appellate, on evidentiary grounds without ordering a new trial. They further involve a common question of law: Is the clause against re-examination of jury verdicts contained in the Seventh Amendment applicable to the states by virtue of the Fourteenth? As set forth in the Sitton petition, the Supreme Court has never expressly ruled on the application of the clause against re-examination to the states.

The Heider Case

The decision in case number 48, *Heider v. Michigan Sugar Co.* is reported at 375 Mich. 490, 134 N.W.2d 637 (1965). An industrial concern owned a 200 acre tract at the outskirts of a small town. There is a 27 acre pond on this tract into which effluent from the plant is discharged. The action is to recover for the death of two small boys who drowned in the pond, apparently when they were walking on ice which gave way under their weight. The plaintiff contended that the pond would not freeze solid and that the ice was "rotten" even in the coldest weather because of the high concentration of industrial waste in the water, that this created a deceptive and dangerous condition, that children would frequently come around the pond and that the defendant failed to take reasonable precaution for the safety of known infant trespassers.

The dissenting opinion states "It was quite clear * * * that *an extremely deceptive and dangerous condition existed*" (134 N.W.2d 645), and the majority has no statement to the contrary. Three witnesses, two of them employees of the defendant, testified that it was common practice for people to hunt and trap on the defendant's land. There was also evidence that small footprints had been seen and the ponds had been used for skating.

The following special interrogatories were submitted to the jury:

(1) Did the company know or should it have known "that children were likely to trespass?"

(2) Did a condition exist as to which the company "knew, or should have known, involved an unreasonable risk of death to child trespassers?"

(3) Was the utility of maintaining the pond in this condition "slight as compared to the risk to child trespassers?"

The jury answered "yes" to each of these questions.

The Michigan Supreme Court stated the question as follows: "WAS THE VERDICT AND JUDGMENT IN EACH CASE AGAINST THE CLEAR PREPONDERANCE OF THE EVIDENCE AND CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?" (134 N.W.2d 638).

It proceeded to answer the question in the affirmative, set aside the verdict and award final judgment to the defendant. It distinguished other attractive nuisance cases by stating "awareness of the infant trespasser was a controlling feature" (134 N.W.2d 641).

The King Case

The opinion of the Louisiana Court of Appeal in case number 388, *King v. Vico Ins. Co.*, is reported at 182 So. 2d 135 (1966). The decision was upheld by the Louisiana Supreme Court in a terse ruling reported at 249 La. 111, 185 So.2d 220 (1966). The case is a personal injury action by the passenger in an automobile for the driver's negligence. It was brought directly against the driver's liability insurance carrier as permitted by Louisiana law. Apparently Louisiana has no automobile guest statute. If there is such a statute in Louisiana, neither the court nor the parties considered it applicable.

The insured driver was proceeding down a narrow street passing between two automobiles parked on each side. As they approached an intersection, a dog walked out into the street and went back. Then, as the car came to the street corner, the dog again "ran out in front" of the car and the driver stopped suddenly causing the plaintiff to be

thrown against the windshield sustaining head and neck injuries. The principal defensive contention was that the driver was " 'acting in a sudden emergency not of her own creation.' " (182 So.2d 135-136).

The case was submitted to a jury, apparently on a general charge; the jury being advised that if a sudden emergency arose and the driver acted as an ordinary and prudent person would act under the circumstances shown, it should find for the defendant; that if the accident was caused solely by circumstances beyond the driver's control, that it should find for the defendant; That if the driver could have timely warned the plaintiff and failed to do so, it should find for the plaintiff; and further that if the driver was proceeding at a rate of speed which was unreasonable considering the circumstances then existing, it should find for the plaintiff.

The jury did find for the plaintiff, thereby answering all these questions in the plaintiff's favor.

The Louisiana appellate court differed with the findings of the jury. It reversed, denied a new trial, and entered judgment against the plaintiff. The question of failure to warn was not discussed. Neither did the court discuss the exact proximity between the dog and the car. It stated "We *feel* that * * * Miss Ray instinctively did exactly what other normal persons * * * would have done" (182 So.2d 137) (our emphasis). Concerning excessive speed, the court pointed to the driver's testimony that she had just started up, was in low gear and was traveling not more than 5 miles an hour. It also pointed out that the windshield was not broken where the plaintiff's head struck it but was cracked into a " 'spider web effect,' " that the plaintiff's head was close to the windshield beforehand, and that the plaintiff did not think she was hurt until later on. It concluded "*We are convinced* that Miss Ray operated her car in a normal way." (182 So.2d 138) (our emphasis).

The Sitton Case

The decision of the Texas Court of Civil Appeals in case number 502, *Sitton v. American Title Co.*, is reported at 396 S.W.2d 899 (1965). The Texas Supreme Court refused to issue a writ of error, without opinion, in an unpublished ruling. The plaintiffs in this case brought action against a title company, a real estate broker, and the grantee in a deed executed by the plaintiffs asserting that the defendants had conspired together, misrepresented the transaction involved and had altered the deed by which plaintiffs had conveyed their G.I. home causing default and foreclosure of their G.I. loan, a substantial mortgage deficiency, impairment of their Veteran's benefits, loss of their valuable credit rating, numerous demands for payment which they could not meet and extensive emotional and physical distress resultant thereto.

The instrument was admittedly in the hands of the title company at the time of the alteration and the grantee admittedly "called someone" at the title company and "requested" a "substitution" of grantees (396 S.W.2d 902). The plaintiffs testified that they were assured by the real estate and title company personnel "that [grantee] Moorman would assume the debt" (396 S.W.2d 901). They further produced an agent of the Veteran's Administration who testified that he called on the parties to investigate the matter and "Moorman told me he had her [Mrs. Brown, the title company officer] do it and she told me she did it" (Testimony 403).

All of the numerous special interrogatories to the jury were returned in the plaintiffs' favor. The jury was asked if the deed was altered "pursuant to any conspiracy" defined as a "combination or agreement of two or more persons, by concerted action to accomplish an unlawful purpose" and its answer was "Yes" (Pleadings 150).

Nevertheless, a judgment *non obstante veredicto* was affirmed by the Texas Court of Civil Appeals. The court

stated it could not "find evidence that any two or more of them engaged in concerted action" (396 S.W.2d 903), that "*we think*" (our emphasis) that the plaintiffs' injuries did not " 'naturally flow' " from nor were they " 'directly or immediately caused' " by the alteration of the deed (396 S.W.2d 904), and that "there was no evidence of a conspiracy * * * or of alteration of the deed as a result of conspiracy" (396 S.W.2d 905). Replying to the contentions that the Seventh and Fourteenth Amendments prohibited the court from overriding a jury verdict supported by evidence of probative force, the court stated that it had been directed to "no specific evidence supporting any part of the verdict * * *. Our examination of the record discloses to us no such evidence and no such violation * * *" (396 S.W.2d 905). The court concluded by stating that plaintiffs had been given "every reasonable opportunity to make out a case" and "they failed to do so" (396 S.W.2d 906).

Common Questions Are Presented

The same basic situation is presented in each of the above cases. In each instance, the plaintiff won his case before a jury and lost it before the court. In each instance, the cases were lost not on questions of law but on questions of fact.[1] In each instance, the higher state court did not order a new trial but entered judgment against the plaintiff. In each instance the question is the applicability through the Fourteenth Amendment of the second clause of the Seventh declaring: "No fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

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[1] In **Heider**, it was further held that recovery was barred by the Michigan "free hunting" statute. The applicability of such statute has no bearing on the other two cases and we concern ourselves solely with the Court's rulings concerning the evidence. May we point out in passing that in invoking this statute on appeal for the first time, the respondent is not seeking merely to call the Court's attention to an additional statute or authority, but it is seeking to change the entire theory of the case after the evidence has been closed.

It is obvious that the Michigan Court considers itself free to follow a much lesser standard for re-weighing the evidence than this Court has insisted upon. The testimony that numerous people went on the company land, that small footprints had been seen and that the ponds had been used for skating served to present at least some evidence that the defendant knew or should have known "that children were likely to trespass." This is clearly not a case where "without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy." *Galloway v. United States*, 319 U.S. 372, 407 (dissenting opinion). The Court did not pretend to so hold. Instead, it presumed that it could constitutionally destroy a plaintiffs' verdict on the grounds that it "was against the clear preponderance and contrary to the great weight of the evidence" (134 N.W.2d 643). It is now well established that to employ such a test in the federal courts, even when litigating state-created rights,[2] or to employ such a test in the state courts, at least when litigating federally created rights,[3] is violative of the Seventh Amendment. Should the Constitution not have equal force and effect in all private litigation? Certiorari has been granted in the *Heider* case and it appears that the Supreme Court will undertake to answer this question.

The *King* case is primarily concerned with the inference taking function of the jury. The trial of causes concerns not only the determination of external physical facts but is concerned with the inferences and deductions which may be legitimately drawn therefrom. Certain questions, such as who struck the first blow in an assault case, or whether a signature is genuine in a forgery case, concern physical, external and directly observable phenomena. If the parties or their witnesses unequivocally testify to direct observa-

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[2] **Dick v. New York Life Ins. Co.**, 359 U.S. 437.

[3] **Lavender v. Kurn**, 327 U.S. 645.

tion, the only remaining question is credibility. On the other hand, matters such as foreseeability, proximate cause, intent, scienter and the like may never be observed directly but must be deduced. They are strictly matters of opinion.

In actual practice, the cleavage between the two types of fact finding is almost indistinguishable if not non-existent. There are often no witnesses to a particular physical fact and the existence or non-existence thereof must be deduced. *Heider* is an example; exactly how the boys fell into the pond will never be known. Consider also relative facts such as the speed of a vehicle. While subject to direct observation and the most precise measurement, speed must almost universally go into evidence by lay estimates that, even in complete honesty, can differ in the extreme. Even when there are direct witnesses to the most positive and readily observable facts such as which driver drove across the center stripe of a highway, it is only through the keenest use of the deductive powers that the trier of facts can determine who is telling the truth. Again, the credibility or uncredibility of a witness is a matter of deduction, strictly a matter of opinion.

There is little dispute in *King* over what happened and how it happened. All that remains are the ultimate questions: (1) Did the driver in stopping suddenly conduct herself as would a prudent person *under the same circumstances?* (2) Was the speed shown excessive *under the existing circumstances?*

Of course it is true that a person cannot be held to the same high standard of care when faced with a sudden emergency. It is equally true that human safety is a much higher consideration than the safety of animals. The federal question is who, judge or jury, should make the determination that the conduct of the defendant's insured was justified by the conditions presented? The federal rule fashioned by the Seventh Amendment is clear. The jury is the proper tribunal to find both the external and internal,

the deductive and the inductive facts. *Dick v. New York Life Ins. Co.*, 379 U.S. 437; Green, *Protection of Jury Trial in Diversity Cases*, 35 Tex.L.Rev. 768 (1967). It would appear that the Louisiana rule differs. Such is quite apparent from the Louisiana Supreme Court's ruling that there is no error "on the *facts found* by the Court of Appeal" (249 La. 111, 185 So.2d 220) (our emphasis).

The *Sitton* case presents yet another facet of the same problem. In conspiracy actions, it is almost universally necessary for the plaintiff to secure the bulk of his evidence from the enemy camp. When people enter conspiracies to unlawfully invade the rights of others, they are not apt to call in a witness. Nevertheless, the plaintiffs produced the strongest evidence we can conceive of in a case of this type. They introduced proof that the instrument was admittedly changed in the offices of the title company, a clear fiduciary; presented uncontrovertible evidence that grantee Moorman was the only person who could have furnished the spurious grantee, his own employee; offered evidence that the real estate broker was the middle man and go-between for the entire transaction, the only person in a position to bring pressure to bear upon the title company; and produced an unimpeachable witness to testify that two of the three participants admitted the entire affair and that the title company officer declared that "she was in the habit of doing that * * * when it was necessary" (Testimony 375).

The appellate court chose to close its eyes to much of this evidence, to gloss over the facts and to declare "there was no evidence of a conspiracy to alter the deed in question * * * our attention is directed to no specific evidence supporting any part of the verdict" (396 S.W.2d 905).

While the Texas court gives lip service to the proposition that the jury "are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony" (Pleadings 148), and recognizes that a case should not be taken from the jury

unless there is no room in the evidence for honest difference of opinion, it appears that the court does not truly consider itself bound by such rules and feels free to depart therefrom whenever it subjectively feels a disaffinity for the verdict reached. If the court has taken to itself the authority to depart from the established standards at will, is this not the equivalent of having no standards at all? The case presents the further question whether the Plaintiffs' failure to observe prudent man standards must be decided in the same manner as the Defendants' failure to so act; that is, by judge or jury.

Summary

The three cases present differing aspects of the same basic situation:

(1) The Michigan Court has expressly ennunciated a watered-down test of the evidence not in harmony with the re-examination clause.

(2) The Louisiana Court has expressly held that with respect to the ultimate inferential facts, it is not restricted from finding those facts directly contrary to the jury's findings.

(3) The Texas Court has expressly considered the application of the Seventh Amendment and has obviously decided that the Amendment does not require it to observe any particular standards or prevent it from departing from its own standards at will.

None of the three cases involves the first clause of the Seventh Amendment. In Michigan, Louisiana, Texas and virtually throughout the Union, the electorate of the individual states have chosen jury trial as the established method for determining private rights. Each of the cases involves the second clause of the Amendment prohibiting the re-examination of jury verdicts; a much more difficult question but an even more vital one because liberties are lost by encroachment ten times oftener than they are lost by direct invasion. Does not the *Sitton* case where the court

has undertaken to apply shifting standards, varying standards, or no standards at all directly violate the Fourteenth Amendment guaranty of an orderly trial in accordance with established procedure in a competent tribunal? We suggest that the record presents such question whether or not the court finds that the re-examination clause of the Seventh Amendment has any application in state court litigation.

Other than the F.E.L.A. cases, no decision concerning the application of the Seventh Amendment to state court litigation has been handed down in forty years. We find no decision ever expressly ruling on the power of state courts to overturn jury verdicts. Certiorari has been granted in *Heider*. To bring forward the *King* and *Sitton* cases and to consider the three cases jointly will give the court the greatest possible opportunity to consider the full ramifications of this vital problem. It is respectfully moved that the three causes be either jointly considered or formally consolidated as the court may deem most expeditious.

Respectfully submitted,

October 25, 1966

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IN THE

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OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, Administrator for the Estate of JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

REPLY BRIEF OF PETITIONER

I.

THE FEDERAL QUESTIONS WERE TIMELY RAISED

Petitioner Heider agrees with Respondent Michigan Sugar Company that it is settled that this Court will not consider a case on certiorari when the petitioner has failed

to raise the federal questions at the appropriate stage of the state court proceedings. Petitioner submits that he did raise the federal questions as timely as was reasonably possible under the circumstances, and that those questions are now properly before this Court.

Respondent offers *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932), as being "on all fours with the instant case". The only similarity which Petitioner perceives is that in each case the federal questions were raised for the first time in a petition for rehearing in the State Supreme Court, and the petition for rehearing was denied without opinion. The crucial distinction between the two cases is that the action complained of in *Baldwin* was the action of the trial court, while here in *Heider*, the action complained of is that of the State Supreme Court. Thus in *Baldwin* the petitioner had ample opportunity to raise the federal questions in the trial court and in the State Supreme Court prior to petitioning for rehearing. In this case Petitioner timely raised the federal questions in his petition for rehearing because he could not reasonably have anticipated that the Supreme Court of Michigan would act in an unconstitutional manner. One cannot seasonably claim violation of his constitutional rights until his rights have been violated.

Consider the circumstances present here. The cases had been pleaded by both parties and tried without any reference whatsoever to the statute, Act No. 201 of the Michigan Public Acts of 1953 (Comp. Laws Supp. 1956, §300.201, Mich. Stat. Ann. 13.1483). Judgments were entered for plaintiff. In moving for a new trial defendant made no reference to the statute. Defendant raised the statute, completely outside of the record on appeal, for the first time in its brief to the Michigan Supreme Court.

The statute was enacted in 1953. It had never been interpreted before by the Michigan Court in any case so far as Petitioner is aware. A very serious question was presented as to whether the Court would pay any attention at all to the statute since it had been raised for the first time on appeal. Respondent's counsel recognized this uncertainty (Brief of Respondent, p. 24). The parties briefed their respective positions as to whether the Supreme Court could entertain consideration of the statute. Three Justices of the Michigan Supreme Court, dissenting, declared that the rule that usually a question may not be raised for the first time on appeal to the Supreme Court "* * * has not received uniform treatment. * * *" They stated further (375 Mich. 490, at 517, 134 N.W. 2d 637, at 649):

> "* * * This is not a proper case to apply the exception. Only when the matter was presented to the trial judge and he refused to rule, or under the clearest of circumstances, where it is unquestioned that the entire matter is before this Court, should the exception prevail.
>
> "Such is not this case in which the question is first presented here as an afterthought and accorded cursory treatment and briefing. * * *"

Another serious question was presented as to the manner in which the Michigan Court would interpret the statute if it did decide to entertain consideration of it. The three dissenting Justices recognized that the statute presented problems of interpretation. They said (375 Mich. 490, at 518, 134 N.W. 2d 637, at 649):

> "* * * The court will also consider and determine any issues with regard to the legality and construction of the act which may be raised, such as whether a minor is a 'person' within the meaning

> of the statute, the word 'person' being undefined and subject to construction in the light of a strong public policy favoring the protection of minors; * * *"

Surely, it would not be reasonable to hold that Petitioner was bound to anticipate that the Michigan Supreme Court would act in an unconstitutional manner by applying the statute and deciding a question of fact that was never before the trial court and concerning which the Petitioner had no opportunity to plead or offer evidence. The presumption that state courts and other public officers will act in a lawful manner was referred to recently by this Court in *Dombrowski v. Pfister,* 380 U.S. 479 (1965):

> "* * * It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court * * *" (380 U.S. 479, at 484)

Once the Michigan Court reached decision and by divided vote decided to entertain consideration of the statute and to apply the statute to this case without affording Petitioner an opporunity to plead or offer evidence with regard to it, Petitioner raised the federal questions in his petition for rehearing. The decision was reached May 10, 1965, and on May 28, 1965, Petitioner filed his petition for rehearing. As part of said petition for rehearing Petitioner offered new evidence in the form of affidavits which tends to take at least the case of David Heider outside the scope of the statute (Record, 339-346). In its opposition to rehearing before the Michigan Court and in its opposition to the petition for writ of certiorari in this Court Respondent made no contention that Petitioner had failed timely to raise the federal questions.

The order denying rehearing was entered October 4, 1965, over four months following the filing of the petition for rehearing. It is the practice of the Michigan Court not to issue an opinion upon denial of rehearing and none was issued here. While three Justices had dissented from the Court's decision, only two Justices dissented from the denial of rehearing. This indicates that the federal questions raised on petition for rehearing were indeed considered by the Michigan Court during the more than four months it was pending decision.

Petitioner submits that this case of *Heider* comes within the rule of *Saunders v. Shaw,* 244 U.S. 317 (1917); *Missouri v. Gehner,* 281 U.S. 313 (1930), and *Ohio v. Akron Park District,* 281 U.S. 74 (1930), which held in effect that when a constitutional privilege has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may timely challenge the unexpected ruling by a motion for rehearing.

In *Saunders v. Shaw,* the plaintiff sought an injunction against collection of a drainage tax. At trial he offered evidence to show that his land was not benefited by the drainage improvement but, upon defendant's objection, the evidence was excluded as inadmissible. However, the evidence was spread upon the record for purposes of appeal. Judgment was entered for the defendant and intervening defendant, a holder of bonds payable from the tax. The Supreme Court of Louisiana affirmed the judgment. Later, it granted rehearing upon the basis of a decision of the Supreme Court of the United States handed down after the first decision. The Louisiana Court observed that the evidence showed that plaintiff's land had not been benefited or drained and could not be drained under the present system, then reversed the judgment and granted an injunction. The intervening defendant then applied for rehearing which